

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

OCT 27 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOSHUA DIMMIG, a single man,)	2 CA-CV 2009-0060
)	DEPARTMENT A
Plaintiff/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
)	Appellate Procedure
PIMA COUNTY, a political subdivision)	
of the State of Arizona; PIMA COUNTY)	
SHERIFF'S DEPARTMENT, a law)	
enforcement agency; PIMA COUNTY)	
DEPUTY SHERIFF LAURA YBARRA)	
and JOHN DOE YBARRA; PIMA)	
COUNTY DEPUTY SHERIFF SCOTT)	
McLEOD and JANE DOE McLEOD;)	
PIMA COUNTY DEPUTY SHERIFF)	
STEVEN LOVE and JANE DOE LOVE,)	
)	
Defendants/Appellees.)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20088482

Honorable Stephen C. Villarreal, Judge

AFFIRMED

Barton & Storts, P.C.
By Brick P. Storts, III, Esq.

Tucson
Attorneys for Plaintiff/Appellant

Barbara LaWall, Pima County Attorney
By Nancy J. Davis

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H O W A R D, Chief Judge.

¶1 Appellant Joshua Dimmig sued Pima County, the Pima County Sheriff’s Department, and individual deputies for injuries he sustained during an arrest. The trial court granted the County’s motion to dismiss the complaint pursuant to Rule 12(b), Ariz. R. Civ. P., and dismissed the complaint against all parties because Dimmig had failed to file proper notices of claim in accordance with A.R.S. § 12-821.01 and because Pima County is not vicariously liable for the deputies’ actions. Dimmig challenges the trial court’s order arguing that Pima County is vicariously liable for the acts of the Sheriff’s deputies under the doctrine of respondeat superior. He also contends the court erred by dismissing the complaint against the Sheriff’s Department and individual deputies because both had actual notice of his claims. Because the trial court did not err, we affirm.

Facts and Procedural History

¶2 In reviewing the dismissal of a complaint for failure to state a claim, “we assume as true the facts alleged in the complaint.” *Doe ex rel. Doe v. State*, 200 Ariz. 174, ¶ 2, 24 P.3d 1269, 1270 (2001). In an effort to arrest Dimmig, a deputy sheriff shot him with a Taser. Dimmig fell to the ground, and another deputy’s patrol car ran over him, at which point he also caught fire. Dimmig filed a timely notice of claim pursuant to § 12-821.01 against the Pima County Board of Supervisors and then sued Pima County, the Pima County Sheriff’s Department, and the deputies who had been involved

in his arrest. The trial court granted the county's motion to dismiss the complaint for failure to state a claim upon which relief could be granted, and this appeal followed.

Pima County and Respondeat Superior Liability

¶3 Dimmig argues that the trial court erred in dismissing his complaint against Pima County because the County is vicariously liable for the actions of the Sheriff's deputies under the doctrine of respondeat superior. We will affirm an order dismissing a complaint for failure to state a claim "only if, as a matter of law, the plaintiff would not be entitled to relief on any interpretation of th[e] facts [alleged in the complaint]." *Doe*, 200 Ariz. 174, ¶ 2, 24 P.3d at 1270.

¶4 Dimmig asserts that A.R.S. § 11-251(1) gives the County control over the Sheriff because he is a county officer. However, that statute pertains to fiscal accountability. And, in *Fridena v. Maricopa County*, 18 Ariz. App. 527, 530, 504 P.2d 58, 61 (1972), this court rejected that statute as a basis to impose vicarious tort liability on a county.

¶5 Dimmig attempts to distinguish *Fridena* by the fact that what was at issue in that case was the duty of the sheriff and his deputies to serve a writ of restitution, an administrative act. But the court in *Fridena* stated that the county was not liable for the sheriff's actions under the doctrine of respondeat superior because service of the writ is a *statutory duty*. *Id.* at 530-31, 504 P.2d at 61-62. The legislature has imposed statutory duties on the sheriff that require him to "[p]reserve the peace" and "[a]rrest . . . all persons who attempt to commit or who have committed a public offense," among others. A.R.S. § 11-441(A). Thus, following the analysis in *Fridena*, Pima County cannot be

liable under the doctrine of respondeat superior for actions in furtherance of the Sheriff's exercise of his statutory powers to preserve the peace and make arrests. *See* 18 Ariz. App. at 530-31, 504 P.2d at 61-62. Therefore, the trial court did not err in dismissing the case against Pima County.

¶6 Additionally, Dimmig contends the trial court abused its discretion by not allowing him to conduct limited discovery of any facts showing Pima County has control over the Sheriff's Department. The County's authority, however, is limited to those powers expressly or by necessary implication given by the state constitution or statutes. *Home Builders Ass'n of Cent. Ariz. v. City of Maricopa*, 215 Ariz. 146, ¶ 5, 158 P.3d 869, 872 (App. 2007). Dimmig has not cited any statute providing a basis for holding Pima County liable for the Sheriff's Department's execution of its statutory duties. Thus, discovery of facts would be futile, and the trial court did not abuse its discretion in denying it.

Lack of Notice to Sheriff's Department and Deputies

¶7 Dimmig next argues that the trial court erred by dismissing the complaint against the Sheriff's Department¹ and the individual deputies because they had actual notice of the claims. Before a party can file suit against a public entity or public employee, a timely notice of claim must be filed with the relevant parties. A.R.S. § 12-821.01(A). We review a trial court's ruling regarding compliance with § 12-821.01 de

¹Based on our resolution of the issues raised, we need not determine whether the Sheriff's Department is a jural entity. We simply refer to the department as Dimmig has in his argument.

novo as an issue of statutory interpretation. *Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 24, 160 P.3d 223, 230 (App. 2007).

¶8 A public entity and public employees must receive a notice of claim, and failure to file notice bars any claim against the entity or an employee. *See, e.g., id.* ¶ 25, 160 P.3d at 230. Compliance with the statute is a “‘mandatory’ and ‘essential’ prerequisite” to filing a complaint. *Id., quoting Salerno v. Espinoza*, 210 Ariz. 586, ¶ 7, 115 P.3d 626, 628 (App. 2005). Furthermore, individual public employees must receive personal notice in addition to the notice of claim served on the public entity. *Id.; Crum v. Superior Court*, 186 Ariz. 351, 352, 922 P.2d 316, 317 (App. 1996). “Failure to comply with the statute is not cured by actual notice or substantial compliance.” *Harris*, 215 Ariz. 344, ¶ 25, 160 P.3d at 230; *see also Falcon ex rel. Sandoval v. Maricopa County*, 213 Ariz. 525, ¶ 10, 144 P.3d 1254, 1256 (2006).

¶9 Dimmig concedes that he did not serve notice on the Sheriff’s Department and the individual deputies, as required by § 12-821.01(A), but he contends that service on Pima County “was tantamount to service upon all the defendants in this case.” The law is otherwise. Dimmig was required to serve a notice of claim on each of the defendants, and actual notice or substantial compliance is not sufficient. *See Harris*, 215 Ariz. 344, ¶ 25, 160 P.3d at 230. Thus, service on the County was not effective for the Sheriff’s Department and the individual deputies, and the trial court did not err in dismissing the complaint as to these parties.

¶10 Finally, Dimmig argues that public policy should have prevented the trial court from dismissing the claims despite this omission. Our supreme court, however, has

already decided all relevant policy issues. *See Falcon*, 213 Ariz. 525, ¶ 10, 144 P.3d at 1256 (actual notice or substantial compliance not a substitute for compliance with statute). And we are bound by the supreme court’s interpretation of § 12-821.01. *See Harris v. City of Bisbee*, 219 Ariz. 36, ¶ 19, 192 P.3d 162, 168 (App. 2008).

Conclusion

¶11 In light of the foregoing, we affirm the trial court’s order granting the County’s motion and dismissing Dimmig’s complaint.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

ANN A. SCOTT TIMMER, Judge*

*The Honorable Ann A. Scott Timmer, Chief Judge of Division One of the Arizona Court of Appeals, is authorized to participate in this appeal pursuant to A.R.S. § 12-120(F) (2003).